4-3100-12605-2

**STATE OF MINNESOTA**
**OFFICE OF ADMINISTRATIVE HEARINGS**
**FOR THE MINNESOTA DEPARTMENT OF VETERANS AFFAIRS**

Darrell A. Gleason,

Petitioner,

v.

Murray County,

Respondent

**ORDER ON CROSS-MOTIONS FOR SUMMARY DISPOSITION**

This contested case proceeding came before Administrative Law Judge (ALJ) Bruce H. Johnson on Darrell Gleason's motion for partial summary disposition of January 31, 2000. The County filed a response on February 17, 2000. Because of the nature of the County's response, the ALJ deemed the County to have cross-filed for summary disposition on the issue of collateral estoppel and so notified the parties. On March 8, 2000, Mr. Gleason filed a reply memorandum. At the request of the ALJ, the parties filed supplemental memoranda on the applicability of the recent decision in *Brula v. St. Louis County.*[1] The record closed on March 8, 2000, with the receipt of the parties' supplemental memoranda.

Gordon L. Moore, III, Von Holtum, Malters & Shepard, Attorneys at Law, 607 Tenth Street, P.O. Box 517, Worthington, Minnesota 56187-0517, appeared on behalf of the Petitioner, Darrell Gleason. Paul Malone, Murray County Attorney, 2605 Broadway Avenue, P.O. Box 256, Slayton, Minnesota 56172-0256, appeared on behalf of Respondent Murray County.

Based upon the record in this proceeding and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

**ORDER**

1. That Mr. Gleason's motion for partial summary disposition is DENIED.
2. That the County's motion for summary disposition is DENIED.
3. That this matter is set for hearing on May 24, 25, and 26, 2000, in Conference Room B, Government Center, 2500 28th Avenue, Slayton, Minnesota.[2]

1 587 N.W.2d 859 (Minn. App. 1999).

2 By agreement of the parties, the hearing may be rescheduled for June 21, 22, 23, 2000, at the same time and place if counsel experience a scheduling conflict.

Dated this 27th day of March, 2000.

BRUCE H. JOHNSON
Administrative Law Judge

## MEMORANDUM

### Underlying Facts

Petitioner Darrell A. Gleason is an honorably discharged veteran of the United States Marine Corps. In 1981, Mr. Gleason suffered a work-related back injury while working at his father's automobile repair shop (Ken's Repair). In 1984, Mr. Gleason was diagnosed as having a herniated disc in his lumbar spine. From 1987 through late October 1993, Mr. Gleason worked as a part-time deputy sheriff for Murray County. In late October 1993, Mr. Gleason was placed on light duty assignment transporting prisoners for the County on an as-needed basis. As a result of this change in work assignments, the number of hours Mr. Gleason worked for the County dropped substantially in 1994 and 1995. Sometime after 1995, Mr. Gleason was no longer contacted for transport duty assignments.

In 1995, Mr. Gleason filed a workers' compensation claim against Ken's Repair. The insurer for Ken's Repair brought in Murray County as an additional party to the proceeding. On September 15, 1995, a workers' compensation judge ruled in favor of Mr. Gleason on some issues but denied other claims.[3] That decision was later affirmed by the Workers' Compensation Court of Appeals.[4] In May of 1996, the Murray County Attorney sought clarification from Mr. Gleason's doctor regarding Mr. Gleason's work restrictions. Mr. Gleason's doctor responded by letter dated June 11, 1996, that Mr. Gleason was "released to do regular work activities as tolerated."[5] Mr. Gleason did not work for Murray County after November 25, 1995. Mr. Gleason had back surgery in February 1998.

The parties agree that Murray County did not provide Mr. Gleason with a notice of his right to a hearing under the Veterans Preference Act after he was placed on light duty in 1993 or immediately after he stopped working as a transport deputy in 1995 or 1996.[6] Instead, Mr. Gleason first received such a notice in a letter from the Murray County Attorney on April 26, 1999 advising him that Murray County intended to "remove [him] from or terminate any status [he had] as a Murray County Deputy Sheriff" and notifying him of his rights to a hearing under the VPA. The letter also stated that some of the reasons for his termination included the fact that Mr. Gleason has not actively worked as a deputy since 1996.[7]

### Contentions of the Parties

Mr. Gleason maintains that the County violated his veterans preference rights when he was demoted from his "road deputy" assignment to light duty work in October of 1993, and again when he was removed from his deputy position in 1995. In each instance, Mr. Gleason did not receive a notice of his right to a hearing. According to Mr.

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3 Respondent's Ex. C.

4 Aff. of Moore, Ex. C.

5 Aff. of Moore, Ex. A.

6 Aff. of Moore, Ex. E, Response to Request for Admissions No. 32.

7 Aff. of Gleason, Ex. F.

Gleason, his demotion from "road deputy" to a light duty assignment resulted in his hours being cut dramatically as he performed only sporadic transport assignments for the County on an as-needed basis. Mr. Gleason argues that the County's decision to demote him from "road deputy" to "transport deputy" constituted a removal for purposes of the VPA. And the County's failure to notify him of his right to a hearing constituted a violation of his veterans preference rights. Mr. Gleason also argues that the County violated his veterans preference rights a second time by removing him from transporting duties completely in 1995 and placing him on indefinite medical leave.

The County, on the other hand, argues that Mr. Gleason voluntarily quit his position as road deputy due to his worsening physical condition. Because an employee who voluntarily resigns or quits is not entitled to a veteran's preference hearing,[8] the County contends that it did not violate Mr. Gleason's veteran preference rights. In support of its position, the County has submitted the transcript of Mr. Gleason's workers' compensation hearing. The County argues that the transcript contains various admissions by Mr. Gleason that he voluntarily quit his position as deputy sheriff. And the County also argues that those admissions should collaterally estop Mr. Gleason from maintaining that he was removed from employment by the County. Finally, the County contends that Mr. Gleason's credibility is suspect because his current claim directly contradicts his sworn testimony in his workers' compensation matter.

## Scope and Standard of Review

Summary disposition is the administrative equivalent of summary judgment in district court practice. Summary disposition is appropriate in cases where there is no genuine dispute about the material facts, and one party must necessarily prevail when the law is applied to those undisputed facts.[9] When considering and making recommendations about motions for summary disposition in contested case proceedings, the Office of Administrative Hearings has generally followed the standards and criteria that have emerged in practice under the Minnesota Rules of Civil Procedure for motions for summary judgment.[10] There, a genuine issue is considered to be one that is not a sham or frivolous, and a material fact is one that is substantial whose resolution will affect the result or outcome of a claim.[11]

The moving party has the initial responsibility of presenting evidence that establishes a *prima facie* claim and of showing that no material fact is in dispute.[12] One way of successfully resisting a motion for summary disposition of a particular claim is for the nonmoving party to show that some specific facts are in dispute that bear on the outcome of that claim.[13] Although the evidence presented to defeat a summary

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8 *Anderson v. City of Minneapolis*, 503 N.W.2d 780, 783 (Minn. 1993).

9 *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955); Minn. R. pt. 1400.5500K (unless otherwise specified, all references to Minnesota Rules are to the 1997 edition); Minn. R. Civ. P. 56.03.

10 Minn. R. Civ. P. 56; *compare* Minn. R. pt. 1400.6600.

*11 Illinois Farmers Insurance Co. v. Tapemark Co*., 273 N.W.2d 630, 634 (Minn. 1978); *Highland Chateau v. Minnesota Department of Public Welfare*, 356 N.W.2d 804, 808 (Minn. App. 1984), *rev. denied* (Minn. 1985).

12 *Thiele v. Stitch*, 425 N.W.2d 580, 583 (Minn. 1988).

13 *Id.*; *Hunt v. IBM Mid America Employees Federal*, 384 N.W.2d 853, 855 (Minn. 1986).

disposition motion need not be in a form that would be admissible at the hearing, the nonmoving party must establish the existence of a genuine issue of material fact by substantial evidence. General claims or contentions about factual disputes are not enough to meet the burden.[14] Finally, when considering a motion for summary disposition, an administrative law judge or an agency must view the facts in the light most favorable to the non-moving party.[15] Put yet another way, if reasonable people could differ about the evidence's meaning under the law, an administrative law judge or an agency should not grant summary disposition.[16] This means that if the outcome of a claim turns on the weight to be given conflicting evidence or on the credibility of witnesses supplying testimony necessary to establish material facts, summary disposition is inappropriate.[17]

## Applicable Law

The issue in this case is whether, for purposes of the Veterans Preference Act, Mr. Gleason quit his employment or was removed by the County either in 1993 or in 1995. Minn. Stat. § 197.46 pertains to the hearing rights of qualifying veterans removed from their employment by a public body. It states, in part, as follows:

> No person holding a position by appointment or employment in the several counties, cities, towns, school districts and all other political subdivisions in the state, who is a veteran separated from the military service under honorable conditions, shall be removed from such position or employment except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, in writing.[18]

Demotions may constitute a removal within the meaning of the Veterans Preference Act entitling a veteran to a hearing.[19] But an employee who voluntarily resigns or quits his position is not entitled to a veteran's preference hearing.[20]

In *Anson v. Fisher Amusement Corp.*,[21] the Court stated:

> Whether the separation from employment is a voluntary or involuntary act of the employee is determined not by the immediate cause or motive for the act but whether the employee directly or indirectly exercised a free-will choice and control as to the performance or nonperformance of the act.[22]

## Discussion

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14 *Id.*; *Murphy v. Country House, Inc.*, 307 Minn. 344, 351-52, 240 N.W.2d 507, 512 (Minn. 1976); *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn. App. 1988), *citing Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

15 *Ostendorf v. Kenyon*, 347 N.W.2d 834 (Minn. App. 1984).

16 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-55 (1986).

17 *Id.*

18 Minn. Stat. § 197.46 (1998).

19 *Leininger v. City of Bloomington*, 299 N.W.2d 723, 726 (Minn. 1980).

*20 Anderson v. City of Minneapolis*, 503 N.W.2d 780, 783 (Minn. 1993).

21 93 N.W.2d 815 (Minn. 1958).

22 *Id.* at 819; *Accord*, *Jansen v. People's Electric Co., Inc.*, 317 N.W.2d 879 (Minn. 1982).

In the instant matter, Mr. Gleason contends that he did not quit his position as deputy sheriff in either 1993 or 1995. Instead, Mr. Gleason maintains that the County demoted him in 1993 and effectively removed him in 1995. Mr. Gleason argues that, unlike *Brula v. St. Louis County,*[23] he never submitted a letter of resignation and he continued to be employed by Murray County until at least the summer of 1995. Mr. Gleason points out that he logged 131.4 hours for the County in 1994, and 141 hours for the County in 1995. Moreover, Mr. Gleason argues that the County's position that he voluntarily quit his employment in 1993 is inconsistent with the fact that the Murray County Attorney sought clarification from Mr. Gleason's doctor in 1996 regarding Mr. Gleason's work restrictions.

According to Mr. Gleason, the facts of his case are similar to those presented in *Myers v. City of Oakdale.*[24] In *Myers*, a police officer and veteran who suffered a lower back injury was placed on indefinite medical leave by the city despite a doctor's report indicating that the officer could return to work. When the police officer requested a hearing under the VPA, the city refused, contending that the officer had not been removed because the officer could return to work at some point in the future. The court held that the city had removed the police officer for purposes of the VPA. The court explained that "under the VPA, a veteran is removed from his or her position of employment when the effect of the employer's action is to make it unlikely or improbable that the veteran will be able to return to the job."[25] Like *Myers*, Mr. Gleason maintains that he was removed from his employment and entitled to a hearing when Murray County's actions in 1993 and 1995 made it unlikely that he would ever return to his job.

Mr. Gleason also cites to the unpublished opinion of *Kramer v. City of Minneapolis*[26] in support of his claim that the County violated his hearing rights. In *Kramer*, a Vietnam veteran employed by the city as an electrician suffered hearing loss and vertigo and was unable to perform his duties. In 1986, the city placed Kramer on a medical layoff. Kramer returned to work in 1989, but he injured himself in a fall six months later. The city placed Kramer on light duty for three weeks, after which he was placed on workers' compensation. After six months on workers' compensation, Kramer returned to work for the city as a clerk, filling in on a temporary as-needed basis. Kramer filed a veterans preference claim and the ALJ concluded that the city had violated Kramer's veterans preference rights when it placed Kramer on medical layoff and when it moved Kramer to light duty because both actions amounted to "removal" within the meaning of Minn. Stat. § 197.46 without a statutorily-required hearing. The Minnesota court of appeals affirmed, remanding for clarification only a narrow issue regarding damages.[27]

The County maintains that Mr. Gleason was not removed, but voluntarily quit his deputy position. It argues that, based on his sworn testimony at the workers' compensation hearing, Mr. Gleason should be collaterally estopped from pursuing his

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23 587 N.W.2d 859 (Minn. App. 1999).

24 409 N.W.2d 848 (Minn. 1987).

25 *Id.* at 850-51.

26 1992 WL 37397 (Minn. App. 1992) (unpublished).

27 *Id.* at 3.

Veterans Preference claims. Specifically, the County points to several exchanges between Mr. Gleason and opposing counsel where Mr. Gleason appears to acknowledge that he quit his deputy position with the County. For example, on page 108 of the transcript Mr. Gleason was asked by counsel for the Minnesota Counties Insurance Trust: "And is it true that even after – well, you quit your job with Murray County in 10-1-93?" And Mr. Gleason responded: "Yes."[28] The County maintains that such representations by Mr. Gleason at his workers' compensation hearing should bar Mr. Gleason from alleging he was removed from his employment by the County.

Collateral estoppel prevents identical parties or those in privity with them from relitigating identical issues in a subsequent, distinct proceeding.[29] In *Graham v. Special School Dist. No. 1,*[30] the Minnesota Supreme Court held that the doctrine of collateral estoppel may be applied in appropriate instances to agency decisions. In order for collateral estoppel to be applied to an agency decision, five factors must be met:

> (1) the issue to be precluded must be identical to the issue raised in the prior agency adjudication; (2) the issue must have been necessary to the agency adjudication and properly before the agency; (3) the agency determination must be a final adjudication subject to judicial review; (4) the estopped party was a party or in privity with a party to the prior agency determination; and (5) the estopped party was given a full and fair opportunity to be heard on the adjudicated issues.[31]

Collateral estoppel should not be rigidly applied.[32] As a flexible doctrine, the focus is on whether its application would work an injustice on the party against whom the estoppel is urged.[33] And both collateral estoppel and *res judicata* are qualified or rejected when their application would contravene an overriding public policy.[34]

In claiming collateral estoppel, the County relies on Finding No. 15 in a set of findings and an order issued by a workers' compensation judge in a proceeding that Mr. Gleason brought to recover workers' compensation benefits from Ken's Repair, namely, a finding that "[s]ince the employee resigned from the Murray County Sheriff Department, Murray County has not offered him *regular* part-time or full-time work."[35] Emphasis supplied.] What the County omits to mention is that same finding goes on to include the following qualification:

> He has on occasion on an irregular basis performed an occasional day of work for Murray County consisting of either court appearances, putting on school programs, or transferring convicts between Minnesota, Iowa, and South Dakota.

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28 Respondent's Ex. B, Transcript of July 14, 1995 workers' compensation hearing at 108, lines 10-12.

29 *Northwestern Nat'l Life Ins. Co. v. County of Hennepin*, 572 N.W.2d 51 (Minn. 1998).

30 472 N.W.2d 114 (Minn. 1991).

31 *Id.* at 116.

32 *AFSCME Council No. 14, Local Union No. 517 v. Washington County Bd. of Com'rs*, 527 N.W.2d 127 (Minn. App. 1995).

33 *Johnson v. Consolidated Freightways, Inc.,* 420 N.W.2d 608, 613-14 (Minn. 1988).

34 *AFSCME Council No. 96 v. Arrowhead Regional Corrections Bd.*, 356 N.W.2d 295, 299 (Minn. 1984).

35 Exhibit A, at p. 7.

In other words, it is clear to the ALJ that in making that finding the workers' compensation clearly understood that Mr. Gleason was then still maintaining some kind of continuing employment relationship with the Murray County Sheriff's Department but that her use of the work "resigned" was merely intended to communicate that he was not then employed as a full duty deputy sheriff. In other words, the ALJ concludes that she ALJ concludes that the identical issue factor required for application of collateral estoppel is not present in this case.[36]

The County argues that the factors for applying collateral estoppel have been met in this case. According to the County, whether Mr. Gleason quit his position as deputy was an issue before the worker's compensation judge and it was necessary to the determination of Gleason's claim for temporary benefits. In addition, Mr. Gleason was represented by counsel at the worker's compensation hearing and he was given a full and fair opportunity to be heard. Mr. Gleason argues that he never testified at his worker's compensation hearing that he quit or resigned his position with the County. Rather, the words "quit" or "resign" were used by the attorneys cross-examining him, and often in confusing and compound sentences. Mr. Gleason maintains that the County has not met the factors necessary to apply collateral estoppel.

Collateral estoppel does not apply unless an issue has been actually litigated and decided.[37] The primary issues in Mr. Gleason's worker's compensation proceeding were whether Mr. Gleason had sustained a Gillette injury after 1981, whether Mr. Gleason was entitled to temporary total disability benefits, and whether the BAK fusion surgery Mr. Gleason sought was necessary and appropriate. These issues are in contrast to the issue of removal from employment that is at the center of Mr. Gleason's veterans preference claim. Moreover, the function of the workers' compensation hearing is different from that of the veterans preference hearing. The purpose of the workers' compensation hearing is to provide a system for compensating injured employees regardless of fault or negligence,[38] whereas, the purpose of the Veterans Preference Act is to protect honorably discharged veterans from arbitrary removals from public employment and the "ravages of a political spoils system."[39] There are at least three issues of material fact that were not necessarily decided in the earlier worker's compensation hearing: (1) was Mr. Gleason's change in status in 1993 from a "road deputy" to a "transport deputy" a voluntary resignation? (2) was that change in status a voluntary demotion?[40] and (3) if the latter, was Mr. Gleason's cessation of work for Murray County in 1995 or 1996, in effect, a removal from a position? None of these issues was litigated in the prior workers' compensation proceeding, nor was any of them necessary to the workers' compensation decision. Accordingly, Mr. Gleason is not collaterally estopped from pursuing his Veterans Preference claims.

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36 *See, Clapper v. Budget Oil*, 437 N.W.2d 722 (Minn. App. 1989), *pet. for rev. denied* (Minn. January 9, 1989).

*37 Schlichte v. Kielan*, 599 N.W.2d 185, 188 (Minn. App. 1999), *pet. rev. denied* (Minn. Nov. 17, 1999).

38 *See, e.g*., *Silva v. Maplewood Care Center*, 582 N.W.2d 566 (Minn. 1998).

*39 Gorecki v. Ramsey County*, 437 N.W.2d 646, 650 (Minn. 1989); *Young v. City of Duluth*, 386 N.W.2d 732, 737 (Minn. 1986); *Johnson v. Village of Cohasset*, 263 Minn. 425, 435, 116 N.W.2d 692, 699 (1962).

40 Both issues involve an inquiry into whether Mr. Gleason's change in employment status was influenced by Murray County. *See*, *Brula v. St. Louis County*, 587 N.W.2d 859 (Minn. App. 1999).

## Conclusion

The Administrative Law Judge concludes that collateral estoppel is inapplicable here and that neither party is otherwise entitled to summary disposition because genuine issues of material fact exist as to whether Mr. Gleason was ever "removed" from his employment with the County within the meaning of the VPA. More specifically, whether Mr. Gleason ever resigned as either a road deputy or as a transport deputy will turn on assessments of his credibility. "Where there is conflicting direct evidence concerning a material fact, a question of credibility arises, which is a question for the trier of fact, and is therefore not appropriately disposed of by summary judgment."[41] Given the conflicting evidence regarding whether Mr. Gleason's changes in employment status were voluntary acts either in 1993 or in 1995, summary disposition is not appropriate here.

B.H.J.

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*41 Baron v. Safeway Stores, Inc.,* 704 F. Supp. 1555 (E.D. Wash. 1988), *quoting*, *T.W. Elect. Serv., Inc., Pacific Electric Contractors Ass'n*, 809 F.2d 626, 630-632 (9th Cir. 1987). *See also*, *Hanson v. Brothers and One, Inc*., 491 N.W.2d 292, 295-96 (Minn. App. 1992), *pet. rev. denied* (Minn. Nov. 17, 1992).